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U.S. District Judge Jed Rakoff of the Southern District of New York has offered an important voice on a wide range of issues in federal practice, typically from the bench. In 2011, for example, he refused to rubber-stamp a $285 million proposed civil settlement between the Securities and Exchange Commission and banking giant Citigroup. Rakoff recently sounded off from the podium on the current state of federal sentencing. On March 7, as the keynote speaker at the 27th Annual National Institute on White Collar Crime in Las Vegas, Rakoff railed against the numerical calculations and formulaic approach that still drives criminal sentencing in federal court: the U.S. Sentencing Guidelines.

Rakoff said the guidelines represent a set of numbers "drawn from nowhere" that continue to steer most federal judges imposing criminal sentences. He's right. The U.S. Sentencing Commission, the congressionally created entity responsible for the guidelines, has never articulated on what basis they equate another $50,000 in loss, the next 40 victims of a scheme, or an additional 20 grams of heroin (each carries a two-level increase in "offense level points" under the guidelines). Rakoff concluded, "Basically, my modest proposal is that they should be scrapped in their entirety."

I, like other academics and (former) federal practitioners, agree in part.

Rakoff's Arguments

Rakoff favors non-numeric guidance over the guideline calculations and greater reliance on judicial reasoning for imposed sentences. He then took aim at the U.S. Supreme Court's limited, deferential standard of appellate review, reasonableness. "These are just numbers, and yet, once they're in place, the whole thing is blessed and said to be rational [by reviewing courts]." Lastly, Rakoff, a former federal prosecutor in Manhattan, questions the power of prosecutors as related to the high percentage of cases handled by plea agreement. Prosecutors negotiate plea agreements "almost exclusively behind closed doors" and it "hurts the justice system," he opined.

Rakoff, like many of us, seeks federal sentences that are fair, well-reasoned and consistent throughout the country. Below are my comments to Rakoff's specific challenges to the current state of federal sentencing.

Guidelines should be 'scrapped immediately'

I disagree. But the federal government should phase out the numbers and calculations in the guidelines. In its 2005 decision, *Booker v. U.S.*, the Supreme Court rendered the guidelines merely advisory, no longer binding on the district court. Yet the court *required* district judges to continue to calculate and consult the guidelines before imposing sentence. The goals of federal sentencing have long included uniformity and consistency. Mathematical computations and sentencing "ranges" under the guidelines were binding on the federal judiciary from 1988 through 2005.

Today, when they must consult the guidelines, some judges believe their sentences should remain consistent with the sentences imposed across the country during this "mandatory guidelines era." Some district judges today do find guidelines numbers and calculations helpful in individual cases — but they won't forever. And it makes no sense to require judges to consult the guidelines while their relevance inevitably diminishes with time.

As opposed to "scrapped" completely, the federal government should phase out the numbers and calculations in the guidelines and convert them into *factors* the court *may* consider. District judges could consult the guidelines as specific factors to consider in individual cases. The numbers and calculations, however, have no sustainable utility. Modern district judges do not consider available sentencing data from the decades of federal sentences preceding the guidelines (pre-1998), right? That's because sentencing numbers from the past are not helpful to judges imposing sentence tomorrow.

Non-numeric guidance lets judges better justify sentences

I doubt it. The Supreme Court mandated that federal district judges not only calculate and consult the guidelines, but also consider the long-forgotten sentencing maxims in Title 18, United States Code §3553(a). This "factors to be considered when imposing sentence" statute includes non-numeric guidance, such as "the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Judges, for the most part, simply recite the language of the non-numeric guidance and touch the bases for the appellate review.

Rakoff states that many in the federal judiciary blindly follow the arbitrary numbers in the guidelines. That's true. But removing the guidelines "in their entirety" will not necessarily result in better justified sentences. Courts would parrot the broad sentencing platitudes and similarly arrive at arbitrary numbers. And the additional downside would be that federal sentences would become less fair and uniform.

In contrast, rather than throw out the guidelines, if district judges were required only to consult the guidelines' numbers and calculations when they are helpful in a specific case, then judges would deviate from the guidelines more and would be more likely to better justify their sentences. Also, the U.S. Probation Office, the arm of the federal court that prepares a pre-sentence report, could provide more numeric information to the district judge before sentencing, such as regional sentencing statistics (since 2005), state statistics of comparable offense conduct, and a digest of comparable sentences. The guidelines need not be the only numbers before the sentencing judge. The courts could weigh the additional information and incorporate it into its own reasoning.

If the goal is to make better and more robust judicial reasoning for federal sentences, then rather than forcing judges to calculate and consider unhelpful numbers, make it optional or incentivize the U.S. Probation Office, and others, to provide more numeric information to the courts to supplement those in the guidelines.

a more robust appellate review

This sounds great, but it would not work. In Rakoff's guideline-less federal sentencing landscape, appellate courts would be bogged down interpreting (and second-guessing) inconsistent, poorly reasoned and ill-supported federal sentences. Again, the problem with lackluster appellate review derives from the numbers and calculations in the guidelines, not the current standard of review.

The standard of review for federal sentencing, also from the Supreme Court in *Booker*, has a procedural and substantive component. Procedurally, appellate courts review whether the district judges calculated and consulted the guidelines and other factors correctly. Substantively, reviewing courts use a "reasonableness" standard to evaluate the punishment imposed. For the most part, district judges have figured out the procedural steps of sentencing since 2005. The relation of the imposed sentence and (again) the numbers and calculations of the guidelines have severely cluttered the appellate courts' true, independent ability to review sentences for reasonableness.

If we phase out the numbers and calculations of the guidelines, then the existing appellate court review and the "reasonableness" standard will become more robust and meaningful.

reliance on plea deals and resolution of cases 'behind closed doors'

I shall save the full extent of my disagreement with this last point for a longer article. Rakoff says the power of prosecutors to negotiate deals "behind closed doors" adds to the problems and "hurts the justice system." I believe in the parties' right to contract for results in plea agreements, and I embrace the power and discretion of prosecutors. As a society, we recognize the prosecutor's power and discretion to decide who faces charges and to determine which charges they face. Why then do we question the prosecutor's power to resolve, prior to a jury determination, and as agreed to by a defendant, those same allegations once brought?

Further, we tried this before — during the mandatory guidelines era, prior to *Booker*, the system restricted prosecutors' role

in sentencing. That approach didn't work for anyone — and it dissolved less than 20 years later. It is inconsistent to grant the prosecution the power and discretion to accuse people of crimes, but then limit its role in resolving those same accusations.

Prosecutors, working with the defense, are better positioned to resolve cases and justify sentences than the federal judiciary. Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure permits prosecutors and criminal defendants to negotiate and contract for an "agreed-upon" sentence, in what are called "binding plea agreements." Rather than happen "behind closed doors," binding plea agreements force the parties to articulate their justification for a sentence in a written agreement and in open court — ultimately which requires the court's acceptance. Binding plea agreements in the federal system are rare because district judges don't care for mechanisms that curb their discretion at sentencing. Unlike district judges, however, the prosecution and defense are in the best position to articulate their justification for an agreed-upon sentence — or proceed to trial.

I hope Judge Rakoff's voice is heard by leaders in the federal government with the power to change our federal sentencing system, and that a robust discussion follows to reach the most optimal solution for the government and criminally accused.

Wes Reber Porter is an associate professor at Golden Gate University School of Law where he teaches courses on evidence, evidence in the courtroom, trial advocacy and white-collar crime. In practice, he was a senior trial attorney for the DOJ's Criminal Division, fraud section, an assistant U.S. attorney and Navy JAG Corps trial counsel.

The Recorder *welcomes submissions to Viewpoint. Contact Vitaly Gashpar at vgashpar@alm.com.*